

Gray Davis, Governor

Maria Contreras-Sweet, Secretary, Business, Transportation, & Housing Agency

Paula Reddish Zinnemann, Real Estate Commissioner

Spring 2001

Commissioner's Message

The Need for Energy Efficiency



In these times of unprecedented energy demand, Governor Davis has called upon both the public and private sectors to significantly lower their energy consumption.

To date, much has been accomplished; however, additional energy efficiency measures are needed. It is incumbent on all of us to do what we can, both in the office and at home, to deter the over-taxing of California's energy supplies. Every individual energy saving measure is essential and such efforts will go a long way towards extending the availability of existing power supplies.

The Department of Real Estate is requesting the assistance of the Real Estate industry in this vital effort. If we all help to conserve energy, we can avoid energy shortfalls, save money and benefit California's economy. Implementing the following energy saving measures will help ensure a brighter future for all of California!

What to do at the Office


1. Minimize heating by keeping the thermostat at 68 degrees or below. Reduce setting to 55 degrees at the end of the day. (For each 1 degree, you will save up to 5% on your heating costs.)
2. Wear comfortable business attire. Dress appropriately for cooler temperatures.
3. Turn off any lights that are not

needed, especially in unused offices and conference rooms.

4. Turn down the remaining lighting levels if practical.
5. Turn off your computer if you are out of the office for more than a few minutes.
6. Some computers have a low power stand-by mode. Check to see if your computer is set for it.
7. If a Stage 3 is imminent, back up your computer and don't forget to frequently save what you are working on, to be ready if the power goes off.

What to do at Home

1. Turn the thermostat down to 68 degrees or below. When practical, reduce setting to 55 degrees or less before retiring or when away for the day.
2. Where practical, avoid running large appliances.
3. Close off vents to rooms that are not being used.
4. Turn off all non-essential electrical lights.
5. Close shades and blinds to reduce the amount of heat lost through your windows.

Thank you for your cooperation. 

Legislation & Regulation Update

AB 2284 - Penalties for Delinquent Threshold Reports Stiffened

Brokers who satisfy the "Threshold Criteria" set forth in Business and Professions Code Section 10232 are required to submit quarterly trust fund status reports and annual Business Activity Reports. Should a broker be delinquent in filing their threshold reports, current law allows the Department to prepare the reports on behalf of the broker at one and one-half times the cost of preparing the delinquent reports. With the passage of AB 2284, effective January 1, 2001, if a broker fails to pay the cost of making the reports within 60 days of the mailing of the bill, the Commissioner may suspend the brokers license or deny the renewal of the broker's license. The suspension or denial shall remain in effect until the amount is paid or the broker's right to renew a license has expired.

Please take note that if you are going to be delinquent in filing a threshold report, contact the Department immediately. The Commissioner may, for good



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MORTGAGE LOAN BULLETIN

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GRAY DAVIS, *Governor*

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DRE's Internet address is:
<http://www.dre.ca.gov>



Legislation & Regulations

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cause, allow an extension for the filing of threshold reports. By keeping the Department informed, it may save you some money and even your license.

The Mortgage Loan Activity Section can be reached at (916) 227-0770.

Regulation 2841 - Clarifies the Use of Nonlicensed Employees.

When AB 653 was enacted in January 2000 it set forth criteria for a real estate broker's use of a nonlicensed employee to assist the broker in meeting the broker's obligation to his or her customers in residential mortgage loan transactions. AB 653 added, in part, the following language to Business and Professions Code Section 10133.1:

- (c) (1) Subdivision (d) of Section 10131 does not apply to an employee of a real estate broker who, on behalf of the broker, assists the broker in meeting the broker's obligations to its customers in residential mortgage loan transactions, as defined in Section 50003 of the Financial Code, where the lender is an institutional lender, as defined in Section 50003 of the Financial Code, provided the employee does not participate in any negotiations occurring between the principals.
- (2) A broker shall exercise reasonable supervision and control over the activities of nonlicensed employees acting under this subdivision, and shall comply with Section 10163 for each location where the nonlicensed persons are employed.

This section does not restrict the ability of the commissioner to discipline a broker or corporate broker licensee or its designated officer, or both the corporate broker licensee and its designated officer, for misconduct of a nonlicensed employee acting under this subdivision, or, pursuant to Section 10080, to adopt, amend, or repeal rules or regulations governing the employment or supervision of an employee who is a nonlicensed person as described in the subdivision.

A plain reading of AB 653 makes it clear that the broker is responsible for, among other things, supervising the activities of any nonlicensed employee engaged in assisting the broker in meeting his or her obligations to their customers in a residential mortgage loan transaction. It is also clear that a broker can be disciplined for failing to adequately supervise the nonlicensed employee and for the misconduct of that employee. In addition it is apparent that the nonlicensed employees may not participate in any of the negotiations between the principals, and the nonlicensed employee must work only from a location licensed by his or her employing broker. What AB 653 did not address is in what activities a nonlicensed employee could engage and not have it be considered negotiation.

To help in this regard, the Department, with the assistance of industry, has promulgated Regulation 2841, effective December 9, 2000, in order to help a broker determine what functions a nonlicensed employee can perform. Regulation 2841 reads as follows:

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2841. Mortgage Loan Negotiation.

(a) The term "negotiation" as used in Section 10133.1(c) of the Code does not include any of the limited activities described as follows when done by an employee of a real estate broker under the control, direction and supervision of the broker:

- 1) Preparing and designing advertising relating to loan transactions for broker review and written approval prior to its distribution, circulation, use or publication.
- 2) Distributing, circulating, using or publishing pre-printed brochures, flyers, fact sheets or other written materials relating to loans secured by real property which the broker can make or negotiate and which have been reviewed and approved in writing by the broker prior to their being distributed, circulated or published. Materials subject to this subdivision may not contain the name, address or telephone number of the nonlicensed employee.
- 3) Providing written factual information about loan terms, conditions or qualification requirements to a prospective borrower that has been either prepared by the broker, or reviewed and approved in writing by the broker. A nonlicensed employee may discuss such information with a prospective borrower in general terms, but may not provide counseling or advice to a prospective borrower.
- 4) Notifying a prospective borrower of the information needed in order to complete a loan application without providing counseling or advice to a prospective borrower.
- 5) Entering information provided by the prospective borrower on a pre-printed application form without providing counseling or advice to a prospective borrower.
- 6) Entering information provided by a prospective borrower or third party into a preformatted computer database.
- 7) Accepting and providing a receipt on behalf of a broker for funds received from a prospective borrower for credit or appraisal fees.
- 8) Preparing and mailing requests for verification of employment, verification of deposits, credit reports or appraisal reports. Obtaining such reports for transmission to the broker.
- 9) Assembling, under the direction of the broker, materials obtained in the course of a loan transaction for submission to a prospective lender or loan

committee, providing the final determination as to completeness or compliance is made by the broker.

- 10) Communicating with a service provider in connection with a loan transaction to determine when reports or other information needed concerning any aspect of the transaction will be delivered, or when certain services will be performed or completed.
 - 11) Mailing, delivering, picking up, or arranging the mailing, delivery, or picking up of documents or instruments related to the loan transaction, including obtaining signatures to the documents or instruments from principals, parties or service providers in connection with the loan transaction, as long as the nonlicensed employee does not interpret or explain the content, relevance, significance or effect of the document or signature and such documents or instruments have been reviewed and approved in writing by the broker.
 - 12) Contacting a prospective lender to determine the status of a loan application.
 - 13) Responding to an inquiry or notifying a prospective borrower or his or her agent of the status of the loan application as long as the nonlicensed employee does not interpret or explain the relevance, significance or effect of that status. A nonlicensed employee may communicate omissions to a party or principal to the loan as long as the nonlicensed employee does not interpret or explain the relevance or significance of those omissions.
 - 14) Preparing and completing documents and instruments under the supervision and direction of the broker if the final documents or instruments will be or have been reviewed and approved in writing by the broker.
 - 15) Arranging or making appointments for third party service providers to enter the real property securing the loan, or arranging or making appointments for the prospective borrower or lender to meet with the broker, lender or other party or service provider in connection with the loan.
- b) As used in this section the terms "loan" or "loan transaction" mean a loan secured directly or collaterally by a lien on real property which is a residential mortgage loan transaction, as defined in Section 50003 of the Financial Code and where the lender is an institutional lender, as defined in Section 50003 of the



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Multi-Lender

Survey Results & Compliance Check List

In California, some real estate brokers arrange multi-lender or fractionalized loans secured by real property. In a multi-lender securities transaction, private investors provide money to a broker who arranges for a loan secured by real property. In exchange for the investment, the broker promises to return to the investors a certain amount of money received from the borrower of the loan. Investors retain a fractional, undivided interest in the promissory note (or retain one of a series of notes) evidencing the loan. These promissory notes, and the fractional interests in the note, are "securities" under the Corporate Securities Law of 1968 (CSL). And in order to arrange a multi-lender transaction, a broker must obtain a permit from the Department of Corporations or otherwise construct the transaction so it is exempt from the permit requirement.



On January 1, 1998, the Department of Real Estate obtained jurisdiction over the multi-lender loan exemption in the form of Business and Professions (B&P) Code Section 10229. At the same time B&P Code Section 10229 was enacted, the Corporations Code was amended to state, in part... "the sale of undivided interests in a note secured directly by real property..., **that complies with all the provisions of Section 10229 of the Business and Professions Code...**" shall be exempt from the permit requirement. What is key for a broker to understand is that failing to comply with **all** the provisions of Business and Professions Code Section 10229 may result in civil and criminal penalties allowed under the Corporations Code as the broker would be guilty of selling an unpermitted security. And it seems many brokers believe the only requirement to qualify for the permit exemption allowed under the Corporations Code is to have 10 or fewer investors on the note. The fact is there are over 15 separate standards under Business and Professions Code Section 10229 that must be satisfied in order to qualify for an exemption.

In order to determine the level of understanding and compliance with the standards set forth in B&P Code Section 10229, the Department of Real Estate and Department of Corporations recently conducted a survey of real estate brokers who are engaged in multi-lender transactions.

The survey was based on various requirements of Section 10229 and 20 brokers were randomly selected to participate. Five multi-lender transactions from each broker were reviewed for compliance with the selected components of B&P Code Section 10229. The survey results disclosed that brokers were fully complying in the following areas:

- Securing promissory notes with real property in California [Section 10229(c)]
- Avoiding any subordination clause in the promissory notes [Section 10229(c)]
- Preventing a broker's interest in the real property [Section 10229(d)(1)]

However, the survey disclosed general noncompliance by brokers with respect to the following requirements of Section 10229.

- Ensuring that there are ten or fewer investors
- Documenting suitability of investors
- Recording the promissory notes
- Utilizing identical terms in promissory notes
- Providing appraisals to investors
- Retaining signed servicing contracts.
- Using the appropriate disclosure statements

- Delivering disclosures to investors

Given the level of noncompliance with various components of Business and Professions Code Section 10229, it would behoove any broker arranging or servicing multi-lender or fractionalized notes to review their business practices to ensure the multi-lender loan transactions they arrange are in compliance with the Real Estate Law. To help in this regard, the following are brief summaries of 15 separate components of Business and Professions Code Section 10229. This is by no means a complete list, but it does address many of the most frequent violations. There is no substitution for reading the entire text of B&P Code Section 10229, which can be obtained at the DRE Web site at www.dre.ca.gov.

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Multi Lender Permit Exemption Check List

The Offering

- If the transaction has been approved by the Department of Corporations (DOC) pursuant to a permit under Corporations Code Sections 25110, 25120 or 25130, then Business and Professions Code Section 10229 does not apply.

The Notice—B&P Code §10229(a)

- The broker must file form RE 860, Multi-Lender Transaction Notice, within 30 days of the first multi-lender transaction and within 30 days of any material change in the information in the notice. This form is to be sent to the Mortgage Loan Activity Section in Sacramento.

The Advertising—B&P Code §10229(b)

- All advertising that solicits investors or borrowers must comply with Regulation 2848, in addition to other general advertising laws.

The Security—B&P Code §10229(c)

- The property must be located in California.
- The note by its term can not be subject to subordination.
- The note must be secured *directly* by real property; collateral lending is not allowed.
- The note can not be a promotional note as defined.

The Broker—B&P Code §10229(d)

- The note must be sold by a real estate broker, either as agent or principal.
- Generally the broker or affiliate can not have an interest in the property securing the loan. (Also see B&P Code §10231.2.)

The Purchasers—B&P Code §10229(e)

- Interests in the note can not be sold to more than ten persons.
- Each purchaser must meet certain income or net worth requirements; the investment cannot exceed 10% of net worth, exclusive of home, furnishings, and automobiles; or the investment cannot exceed 10% of AGI.
- The broker must have a signed statement from each investor confirming they meet the net worth or income requirements.

The Interests—B&P Code §10229(f)

- Each of the interests of the purchasers shall be identical in their underlying terms. There may be,

however, different selling prices to allow for changes in the market price.

The Equity—B&P Code §10229(g)

- Generally the aggregate principal amount of the notes or interests sold, together with the unpaid principal amount of any encumbrances upon the real property senior thereto, shall not exceed the following percentages of the current market value*:

80% Single-family residence, owner-occupied

75% Single-family residence, not owner-occupied

65% Commercial and income-producing properties

65% Single-family residentially zoned lot or parcel which has installed offsite improvements including drainage, curbs, gutters, sidewalks, paved roads, and utilities as mandated by the political subdivision having jurisdiction over the lot or parcel.

50% Land which has been zoned for (and if required, approved for subdivision as) commercial or residential development

35% Other real property

* Note, there are very limited exceptions to the above LTVs. See B&P Code §10229(g) for exceptions. Market value can be determined by appraisal or broker. (Also see B&P Code §10232.6.)

The Terms of Default & Foreclosure—B&P Code §10229(h)

- The documentation of the transaction shall require that (1) a default upon any interest or note is a default upon all interests or notes, and (2) the holders of more than fifty percent of the record beneficial interests of the notes or interests may be governed by the actions to be taken on behalf of all holders in accordance with Section 2941.9 of the Civil Code in the event of default or foreclosure for matters that require direction or approval of the holders, including designation of the broker, servicing agent, or other person acting on their behalf, and the sale, encumbrance, or lease of real property owned by the holders resulting from foreclosure or receipt of a deed in lieu of foreclosure.

Receipt of Funds: Trust Accounts & CPA Review—B&P Code §10229(i, n, o)

- Broker must have a specific transaction identified before accepting any funds. No blind pools. (Also see B&P Code §10231.)
- All funds must be handled in accordance with B&P Code §10145.

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Check List

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- Broker must file CPA prepared quarterly and annual reports with DRE **only** if servicing volume exceeds \$125,000 in payments due in a three month period OR if the number of investors entitled to the payments exceeds 125. (See B&P Code §10229(j)(3).)

The Servicing—B&P Code §10229(j)

- There must be a written servicing agreement. (Also See B&P Code §10233.)
- A broker or other exempt entity (e.g., a bank) must handle the servicing.
- The payments received on the note or notes shall be transmitted to the purchasers or lenders pro rata according to their respective interests within 25 days after receipt thereof by the agent. (Also see B&P Code §10231.1.)
- The servicing agent shall file a request for notice of default upon any prior encumbrances and promptly notify the purchasers or lenders of any default on the prior encumbrances or on the note or notes subject to the servicing agreement.
- The servicing agent shall promptly forward copies of the following to each purchaser or lender:
 - (A) Any notice of trustee sale filed on behalf of the purchasers or lenders.
 - (B) Any request for reconveyance of the deed of trust received on behalf of the purchasers or lenders.
- Pursuant to B&P Code §10229(j)(3), if the broker, directly or through an affiliate, is the servicing agent for notes or interests sold upon which the payments due during any period of three consecutive months in the aggregate exceed one hundred twenty-five thousand dollars (\$125,000) or the number of persons entitled to the payments exceeds 120, the trust account or accounts of that broker or affiliate shall be inspected at no less than three-month intervals, during which the volume is maintained, by an independent certified public accountant. (See B&P Code §10229(i)(4).)

The Disclosures—B&P Code §10229(k)

- The broker must give each investor a lender/purchaser disclosure statement (DRE form RE 851A for loan originations or RE 851B for the sale of an existing note).
- Collateral lending is not allowed so the RE 851C, which is the disclosure used in note hypothecation, should never be used in a multi-lender loan.

The Identity of Purchasers—B&P Code §10229(l)

- The broker or servicing agent shall furnish any purchaser of a note or interest, upon request, with the names and addresses of the purchasers of the other notes or interests in the loan.

Option To Purchase—B&P Code §10229(m)

- The real estate broker shall not have the option or election to acquire the interests of the purchasers or lenders or to acquire the real property securing the interests. This subdivision shall not prohibit the broker or affiliate from acquiring the interests with the consent of the purchasers or lenders whose interests are being purchased, or the property with the consent of the purchasers or lenders, if the consent is given at the time of the acquisition.

The Disclaimer—B&P Code §10229(p)

- The jurisdiction of the Commissioner of Corporations under the Corporate Securities Law of 1968 shall be neither limited nor expanded by the provisions of the section. Nothing in this section shall be construed to supersede or restrict the application of the Corporate Securities Law of 1968. A transaction under this section shall not be construed to be a transaction involving the issuance of securities subject to authorization by the Real Estate Commissioner under subdivision (e) of Section 25100 of the Corporations Code.

Agency—B&P Code §10229(q)

- Nothing in this section shall be construed to change the agency relationships between the parties where they exist or to limit in any manner the fiduciary duty of brokers to borrowers, lenders, and purchasers of notes or interests, in transactions subject to this section.

As you can see by the extent of the check list, there is more to the multi-lender permit exemption than just having ten or fewer investors on the note. For further clarification please call the Mortgage Loan Activity Section at 916-227-0770. 📞

RMLR or HMDA

Which one is right for you?

The Home Mortgage Disclosure Act (HMDA) requires lenders who meet certain lending or asset thresholds in residential mortgage loan transactions to report data about the applications they received and provide information about certain characteristics of applicants. The reports are filed annually with the Department of Housing and Urban Development (HUD).

In California, Senate Bill 1556 created a similar requirement under Health and Safety Code Sections 35815 and 35816 for lenders, *who are not required to report under HMDA*, to file the Residential Mortgage Loan Report (RMLR) with their respective state regulatory agency. Lenders must file the reports no later than March 31st for loan activity in the prior calendar year.

In the past, the Department has received RMLR's from lenders who, on the basis of the data submitted, appear to qualify for filing under HMDA and, therefore, would be exempt from filing with DRE. The following is intended to reduce any confusion for DRE licensees so that they may file only the report required of them:

1. A lender must report under HMDA if: a) it has assets, on the preceding December 31, of more than \$10 million (based on the combined assets of both the institution and any parent corporation) *or* b) originated 100 or more home purchase loans (including refinancings of such loans) during the preceding calendar year, regardless of asset size.
2. A lender *need not* report under HMDA, even if it meets the above criteria, if its home purchase loans originated in the preceding calendar year came to less than 10% of its total loan origination volume measured in dollars. (A careful reading of HMDA should be made to determine if a lender should be filing these reports.)

3. A lender must report to the DRE if: a) it does not meet the above requirements for HMDA reporting *and* b) regularly makes loans on 1–4 unit residential real property. Regularly is defined to mean at least 12 or more transactions in the immediately previous calendar year that, in the aggregate, total more than \$500,000 in value. Only licensed lenders making 10% or more in qualifying loans must report. It is important to note that only lenders are required to file these reports. Brokers who are merely arranging or packaging loans need not file.

Therefore, if a lender meets the requirements for HMDA reporting, it need not submit the Residential Mortgage Loan Report to the DRE. If it does not meet the HMDA reporting requirements, it must determine if it qualifies for filing the RMLR using the criteria set forth above.

Save yourself some time and expense and make sure you are filing only the report that is required of you. Questions regarding the Residential Mortgage Loan Report may be directed to the Sacramento Mortgage Lending Unit at (916) 227-0770. 📞

Legislation & Regs

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Financial Code. Other than the acts specifically authorized by this Section, at no time may the nonlicensed employee perform any acts for which a real estate license is required within the meaning of Section 10131(d) of the Business and Professions Code.

- c) As used in this Section and in Section 10133.1(c) of the Code the term “employee” means a person in the service of a broker under any appointment or contract of hire, express or implied, oral or written and for whom the broker is obligated to withhold income tax payments and provide workers compensation insurance and unemployment insurance.
- d) As used in this Section, the term “written approval” shall consist of the broker’s signature or initials affixed by the broker to a copy of the instrument being approved along with the date of the approval. The broker shall retain a copy of the approval for a period of three years from the date the approval was made. A broker may delegate to a broker or salesperson employed by the broker the authority to provide written approval so long as the broker does not relinquish overall responsibility for supervision of nonlicensed persons acting under this Section.

It is worth noting that if a broker hires a nonlicensed employee to perform, under the exemption set forth in Section 10133.1(c), some or all of the functions set forth above, the nonlicensed employee must be a W-2 employee and not an independent contractor. If you have any questions regarding the use of nonlicensed employees or Regulation 2841, please call the Mortgage Loan Activity Unit at 916-227-0770. 📞

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